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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/838,809	04/20/2001	Grant E. DuBois	04286.00010	3526
22852	7590	03/24/2005	EXAMINER	
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER LLP 901 NEW YORK AVENUE, NW WASHINGTON, DC 20001-4413			PADEN, CAROLYN A	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 03/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/838,809

Applicant(s)

DUBOIS ET AL.

Examiner

Carolyn A Paden

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 22 February 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 13, 14, 16-20, 23, 26-28, 31, 34-37, 40, 42, 43, 54-90, 97-102 and 106-111 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) all is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 3-22-05

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☒ Other: 3-22-05

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 22, 2005 has been entered.

Claims 13, 14, 16-17, 19, 20, 23, 26-28, 31, 34-37, 40, 42, 43, 54-90, 97-111 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The recitation "dynamic beverage dispenser" is not in the specification as it was originally filed. Applicant generally argues that the phrase described the dispenser's inherent properties but the specification is not specific enough to so limit the dispenser.

Examiner appreciates applicants' help with the terms tagatose, salt, acesulfame-K, cyclamate and sucralose that were discussed in the last office action.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 13, 14, 16, 17, 19-20, 23, 26-28, 31, 34-37, 42, 43, 54-90, 111 rejected under 35 U.S.C. 102(e) as being anticipated by Broz (US 2002/0197376), now U.S. Patent 6,741,879.

Broz discloses a beverage concentrate containing carbonated water, a polyol, flavor and a high intensity sweetener (see abstract). The beverage is designed to be utilized in a dispenser for slush beverages

(page 1, paragraph 15 and 2). High intensity sweeteners are also disclosed. Erythritol and sorbitol are disclosed to have a desirable freezing point lowering effect ( page 2, paragraph 17). The amount of freezing point depressant is selected so that the beverage can be processed in standard equipment (paragraphs 2 and 15). Thus it is the examiners position that all of the conditions of claim 13 are anticipated by the reference.

Applicant addressed this rejection by providing a declaration under 35 USC 1.131. This declaration and data does not alone overcome the rejection because there are no high intensity sweeteners in the provided lab notebook pages. The notation in the column to "need to incl. sweetness" does not provide evidence of reduction to practice. Applicant indicated intent to file a document defining the numeric HF ingredients on the notebook page, but the information was not provided. Further the claims are not commensurate in scope with the ingredients in the laboratory notebook. Applicant urges that the flavor or sweetness is incidental to the important type of ice that is formed. This argument has been considered but it not persuasive. The whole idea of the invention is to obtain a low calorie carbonated dispenser beverage having the taste of a full calorie product. It is very well known in the art that the sweetness level

of low calorie sugars is different from sucrose. If the sweetness is not optimized, the beverage will not have desired taste quality. So it is the examiner's position that the taste of the product is essential to the development of the final product.

Claims 34-36, 64-67, 69, 71, 73, 76, are rejected under 35 U.S.C. 102(e) as being anticipated by Stefandl (2002/0136803) in view of Beyts.

Stefandl discloses a freezer altering additive composition for use with commercial beverages. The composition is made from a 1) carbohydrate, 2) glycerol or propylene glycol and 3) a sugar alcohol such as sorbitol and erythritol (claim 1). The beverages are ready-to-drink compositions such as cola and cream soda (paragraph 33). Artificial sweeteners are also contemplated in the product. The freeze altering composition is simply added to the bottle and the bottle is tossed into the freezer (note sample D at paragraph 53). Although not specifically stated, cola and cream soda are well known in the art to be carbonated beverages. The dispenser, in this case, is the bottle in the freezer. The claims appear to differ from Stefandl in the recitation of the inclusion of a high intensity sweetener in the product and in the recitation that sugar alcohols are sweeteners. Beyts

teaches that sucralose is a high intensity sweetener that has a synergistic relationship with sweet saccharides. Beyts also shows that sugar alcohols are sweeteners. Thus one of ordinary skill in the beverage art would have been able to modulate the sweetness of Stefandl by adjusting the amount and type of sweetener in the product. It is appreciated that the given freezing point of the product is not mentioned in the reference. But no difference is seen between the freezing point of the beverage of the claims and the freezing point of Stefandl.

Applicant addressed this rejection by providing a declaration under 35 USC 1.131. This declaration and data does not alone overcome the rejection because there are no high intensity sweeteners in the provided lab notebook pages. The notation in the column to "need to incl sweetness" does not provide evidence of reduction to practice. Applicant indicated intent to file a document defining the numeric HF ingredients on the notebook page, but the information was not provided. Further the claims are not commensurate in scope with the ingredients in the laboratory notebook. Applicant urges that the flavor or sweetness is incidental to the important type of ice that is formed. This argument has been considered but it not persuasive. The whole idea of the invention is to

obtain a low calorie carbonated dispenser beverage having the taste of a full calorie product. It is very well known in the art that the sweetness level of low calorie sugars is different from sucrose. If the sweetness is not optimized, the beverage will not have desired taste quality. So it is the examiner's position that the taste of the product is essential to the development of the final product.

Claims 13, 14, 20, 23, 28, 31, 37, 43, 54-90 and 106-110 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich (3,826,829) in view of Beyts (5,380,541)

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additionally shown at column 4, lines 1-4. Claim 13 appears to differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product and in the recitation of a low calorie sugar as a freezing point depressant. Beyts teaches the combination of sweeteners



that include high intensity sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Thus it would have been obvious at the time of applicants invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point. It is appreciated that "salt" is not included but to utilize salt as a flavor in Marulich would have been an obvious matter of choice with regard to the particular flavor that is desired in the product.

Claims 16, 17, 26, 34 and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts as applied to claims 13, 14, 20, 23, 28, 31, 37, 43, 54-90 above, and further in view of Cole for reasons of record.

Marulich discloses a slush beverage that is carbonated and is formed with water, sugars, polyols, flavor and coloring agents (see abstract). At column 3, lines 52-62, the concept of using polyhydric alcohols, such as glycerol, sorbitol and propylene glycol and combinations thereof is indicated. These polyhydric alcohols are termed "freezing point depressant material" at column 2, lines 52-55. Carbonation of the beverage is additionally shown at column 4, lines 1-4. Claim 13 appears to

differ from Marulich in the recitation of the inclusion of a high potency non-caloric sweetener in the product. Claim 16 appears to differ from Marulich in the recitation that the low calorie sugars are freezing point depressants. Beyts teaches the combination of sweeteners that include high intensity sweeteners. Beyts also shows that sorbitol is a sweetener (see Table at column 4, lines 36-49). Cole teaches that saccharides and sugar alcohols are well known to depress the freezing point of edible formulations (column 1, lines 21-35). Thus it would have been obvious at the time of applicants invention to utilize the high intensity sweetener of Beyts to modify the sweetness of Marulich while maintaining a beverage with a desired depress freezing point.

Claims 19, 27 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the rejected claims above, and further in view of DeCock for reasons of record.

The claims appear to differ from Marulich in view of Beyts and further in view of Cole in the recitation that erythritol is a sugar alcohol. This evidence is provided by De Cock (column 1, lines 21-35). Thus with the references before him, one of ordinary skill in the art would have

recognized that the polyhydric alcohols of Marulich included the sugar alcohols of Cole and the erythritol of deCock as a suggested freezing point depressant.

Claims 97-102 are rejected under 35 U.S.C. 103(a) as being unpatentable over Marulich in view of Beyts and further in view of Cole as applied to the claims rejected above, and further in view of Anderson for reasons of record.

The claims appear to differ from Marulich in the use of tagatose. Anderson discloses that tagatose is a well-known non-caloric sweetener that can be used in beverages and also has synergistic sweetening when combined with other non-caloric sweeteners. It would have been obvious at the time of applicants' invention to utilize tagatose as a non-caloric sweetener in the composition of Marulich in order to provide sufficient sweetness to the product without adding a lot of calories.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano, can be reached on (571) 272-1398 or by dialing 571-272-1700. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Carolyn Paden*  
CAROLYN PADEN 3-10-05  
PRIMARY EXAMINER 1761



PATENT  
Customer No. 22,852  
Attorney Docket No. 07738.0147-00000

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:

Grant E. DUBOIS et al.

Application No.: 09/838,809

Filed: April 20, 2001

For: NON CALORIC FROZEN  
CARBONATED BEVERAGE

)  
)  
) Group Art Unit: 1761  
)  
) Examiner: C. Paden  
)  
)  
) Confirmation No. 3526  
)

**MAIL STOP RCE**

Commissioner for Patents

P.O. Box 1450

Alexandria, Virginia 22313-1450

Sir:

**INFORMATION DISCLOSURE STATEMENT UNDER 37 C.F.R. § 1.97(b)**

Pursuant to 37 C.F.R. §§ 1.56 and 1.97(b), Applicants bring to the attention of the Office the following information. Under 37 C.F.R. § 1.97(b)(4), this Information Disclosure Statement is being filed before the mailing of a first office action after the filing of a Request for Continued Examination. Therefore, no fee is necessary for its consideration by the Office.

In or around 1990, The Coca-Cola Company marketed and sold a frozen carbonated beverage under the Fanta® label in Wild Cherry flavor. The product contained the following ingredients: water, high-fructose corn syrup, flavor (including propylene glycol as a microbial preservative), citric acid, sodium benzoate (preservative), caramel color, yucca extract, quillaia, red 40, aspartame, and sodium saccharin.

*Considered Carolyn Paden*

3-10-05

The product had the following calorie counts: 69 cal./8 oz. liquid; 38.4 cal./8 oz. at 80% expanded; 32.9 cal./8oz at 110% expansion. The product was made to be sold at 95 $\pm$ 15% expansion. Substantial amounts of high-fructose corn syrup were considered necessary to achieve appropriate performance in a frozen carbonated beverage dispenser.

Applicants reserve the right to take appropriate action to establish the patentability of the disclosed invention over the cited information, should it be applied against the claims of the present application.

If there is any fee due in connection with the filing of this Information Disclosure Statement, please charge the fee to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

Dated: February 22, 2005

*Robert C. Stanley*  
*Reg. No. 55,830*  
By: \_\_\_\_\_  
for *Lori-Ann Johnson*  
*Reg. No. 34,498*

*considered Carolyn Paden*